STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DUANE PARK DEVELOPMENT CORP.	:	DETERMINATION
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	: :	

Petitioner, Duane Park Development Corp., 725 Fifth Avenue, New York, New York 10022, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers pursuant to Article 31-B of the Tax Law (File No. 806901).

A hearing was commenced before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 9, 1990 at 9:15 A.M., and continued to conclusion at the same place and before the same Administrative Law Judge, on March 22, 1990 at 1:15 P.M., with all briefs to have been submitted by June 18, 1990. Petitioner appeared by Ira Postell, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether the sale of certain cooperative units were exempt from gains tax under the grandfather exemption provided in Tax Law § 1443(6).

II. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 1446.

FINDINGS OF FACT

Following a field audit of Duane Park Development Corp. (hereinafter "petitioner") the Division of Taxation issued to petitioner a Notice of Determination of Tax Due under Gains Tax Law Section 1444 on January 14, 1988, which set forth the following explanation:

"Recently a field audit was conducted by our New York District Office. As a result

> of that audit, it was determined that Real Property Transfer Gains Tax plus penalty and interest was due. Since the additional Gains Tax plus penalty and interest has not been paid this Notice of Determination has been issued for the following unpaid amounts.
>
> Tax: $208,781.00
> Penalty: $73,073.00
> Interest: $37,536.00
> Total: $319,390.00
> Paid: $0.00
> Balance: $319,390.00
> Interest, 10/24/87 to 2/12/88: $5,681.76"

The entire amount due pursuant to this notice of determination was $325,071.76.

On September 28, 1982, the New York State Department of Law accepted the offering plan of Duane Park Development Corp., sponsor and selling agent, for a plan to convert to cooperative ownership premises at 88-01-09 and 88-02-10 35th Avenue, Jackson Heights, New York.

Subsequent to said acceptance and issuance, shares in said premises were sold beginning on June 26, 1984 through June 15, 1987.

Concededly, no gains tax was paid on the transfer of any of the shares during this period. Petitioner was represented by and relied upon counsel and an accountant with regard to the cooperative conversion and its filings with the Attorney General.

None of the shares was sold prior to March 28, 1983, which was the effective date of the tax on the gains on the transfer of real property including the transfer of shares in cooperatives.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner claims that its sales of the cooperative shares were subject to grandfathering under the real property gains tax and therefore exempt from tax. Petitioner bases this belief on the fact that the cooperative plan was filed with the Attorney General's office approximately one year before the effective date of the tax. Petitioner also contends that no penalty should be imposed, since petitioner was reasonable in its belief that no tax was due. In this regard, petitioner's president, Abe Hirschfeld, testified that he was told by someone at the Attorney General's office that the transfers in issue would not be subject to tax.

The Division contends that since no contracts were entered into for the sale of cooperative shares prior to March 28, 1983, the effective date of the real property gains tax, no exemption is warranted. Further, the Division does not believe that petitioner has shown reasonable cause for the abatement of penalty in this case.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property within the State of New York at the rate of 10% of the gain.

B. Tax Law 1442, states, in pertinent part, as follows:

> "(a) General. The tax imposed by this article shall be paid by the person liable for the tax to the commissioner of taxation and finance, or to any agent of such commissioner appointed pursuant to section fourteen hundred forty-nine-b of this article, no later than the first business day after the date of transfer.
>
> (b) Cooperative or condominium plan or partial or successive transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. In the case of partial or successive transfers which are treated in the aggregate pursuant to subdivision seven of section fourteen hundred forty of this article, the date of transfer shall be deemed to be the date on which each partial or successive transfer of the aggregated transfer is transferred."

Therefore the tax due in the instant matter was due on the date each cooperative or condominium unit was transferred.

Tax Law § 1443.6 provides for an exemption:

> "Where a transfer of real property occurring after the effective date of this article [March 28, 1983] is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of paid deposit or other facts and circumstances as determined by the tax commission."

In such a circumstance, a total or partial exemption shall be allowed pursuant to section 1443. This was not the case in the instant matter, where petitioner had only filed a cooperative plan with the Attorney General's office prior to the effective date and did not, in fact, enter into a written contract for sale of the cooperative shares prior to the effective date which would have entitled it to an exemption pursuant to Tax Law § 1443.6. Therefore, payment of the tax was due pursuant to Tax Law § 1442(b) as set forth above.

C. Tax Law § 1446.2(a) provides, in part, as follows:

> "Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty.... If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

The only evidence of reasonable cause offered by petitioner herein was reliance on a conversation with an unidentified person at the Attorney General's office by Abe Hirschfeld, president of petitioner, in which he was purportedly informed that the sale of the shares in the cooperative plan would be eligible for the exemption from real property gains tax.

However, Mr. Hirschfeld admitted that he relied upon his attorney and accountant for all filings and advice with regard to the cooperative conversion and it seems inconsistent that he would rely upon a telephone conversation with an unidentified person in the Attorney General's office in such a serious matter as the payment of a substantial amount of gains tax.

A conversation with an unidentified person in the Attorney General's office does not reach the level of reliance on the advice of counsel which in itself does not establish reasonable cause (Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). Rather, it has been held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (see, e.g., Matter of Birchwood Associates, Tax Appeals Tribunal, July 27, 1989).

Nothing in the record indicates that petitioner sought the advice of the Department with regard to its qualification for an exemption pursuant to section 1443.6. Additionally, the regulations which were promulgated pursuant to Tax Law § 1443.6, effective in September of 1985, only address themselves to grandfathered contracts, not grandfathered offering plans. (20 NYCRR 590.20, 590.21, 590.22, 590.23.) Petitioner's argument that an offering plan should be subject to the grandfather clause is beyond the scope of the statute and not included in the regulations. Therefore, it is found that taxpayer's position was unreasonable, and an abatement of the penalty and penalty interest is not warranted.

D. The petition of Duane Park Development Corp. is denied and the Notice of Determination of Tax Due under Gains Tax Law, dated January 14, 1988, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE